Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

WILLIAM S. WALSH

Petitioner,

v.

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

Respondent.

On Petition For A Writ Of Certiorari
To The District Court of Appeal
Fifth District

PETITION FOR WRIT OF CERTIORARI

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7 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeal, Fifth District, committed error by overlooking the issue to be resolved on Appeal: that the ALJ abused his discretion with findings of fact in the Recommended Order that are contrary to the evidence and record of the proceedings and in violation of *F.S.A.* sections 120.57 and 120.68, and misapprehending the "Substantial Evidence Rule" as cited in *Epps v. Harris,* 624 F.2d 1267 (1980), and *42 U.S.C.A.* section 404(g).

2. Whether the Court of Appeal, Fifth District, committed error by misapprehending the Court's opinion cited in *Hamilton County Board of Comm'rs v. State, Dep't of Environmental Regulation,* where Petitioner filed its Proposed Recommended Order untimely and without its own motion for continuance that had been ruled on, in which the ALJ, seventeen days after the PRO's were due in his office, filed his Recommended Order and in doing so, rule Petitioner's PRO was timely filed, in violation of *F.S.A.* section 403.011 *et seq.*

3. Whether the Court of Appeal, Fifth District, committed error by overlooking counsel for Petitioner's violation of the *American with Disabilities Act of 1990,* by switching the ordered conference room, to a small computer room,

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only adding to Walsh's disability, and the Court's overlooking Walsh's open-heart surgery in which he couldn't, when needed, file a motion for relief due to the Court's Order.

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STATEMENT OF JURISDICTION

The judgement of the Court of Appeal of Florida, Fifth District, was entered April 10, 2001, [App. A]. The Court of Appeal denied Appellant's timely petition for Rehearing on May 10, 2001 [App. B]. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1), and/or 28 U.S,C. 1257.

PETITION FOR WRIT OF CERTIORARI

Petitioner, William S. Walsh, respectfully petitioners the Court for writ of certiorari to review the final judgement of the Court of Appeal, Fifth District, entered on April 10, 2001, which AFFIRMED, PER CURIAM, the final order of the department of Business and Professional Regulation, etc., for the State of Florida.

OPINIONS BELOW

The opinion of the Court of Appeal, Fifth District, is reprinted in the Appendix A (App. 1).

STATUTES INVOLVED IN THIS CASE

The Writ of Certiorari to this Court must be granted as all of the issues Petitioner (Walsh) addresses to this Court are supported by Florida Statutes, Federal Statutes, and Federal Rules.

28 *U.S.C.* section 1257 provides:

State courts; certiorari

(a) Final judgements or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any other State is drawn in question on the ground of it being repugnant to the Constitutional treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of or and commission held or authority exercised under the United States.

It is apodictic that this Court address the constitutional questions that are arbitrary and irrational discrimination brought before and directly addressed by the State courts. *Bankers Life and Casualty v. Crenshaw, (1988)* 486 U.S. 71; 108

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S.Ct. 1645; *Munks v. New Jersey,* 398 U.S. 71; 90 *S. Ct.* 1563; *American with Disabilities Act of 1990,* section 3(2)(A); *Federal Rule of Evidence, Rule* 103, *F.S.A.* section 120.68(7)(d); *F.S.A.* section 403.011 *et seq.; F.S.A. Constitutional Declaration of Rights,* section 11; *F.S.A.* section 120.57(1)(b)(9); *License Laws & Professional Affiliation Rules*, pages 327-328; Florida Statutes section 120.68(10); Florida Statutes section 120.57(1)(b), 8,9,10.; Section 475,01 Florida Statutes; Section 120.68(7)(c), Florida Statutes; *U.S.C.A.* 28 Rule 402; 5 *U.S.C.A.* section 706(2)(A,B); 28 *U.S.C.A.* section 1254(1); 28 *U.S.C.A.* 1257; 42 *U.S.C.A.* section 12102 (2)(A); *Street v. New York,* 3944 U.S. 576; 89 *S.Ct.* 1354; *Owens v. Norwood Lecy;* 5 *Cranch.* 330, 344 (1809). *Safeway Stores Inc. v. Oklahoma Retail Grocers Association Inc.,* 360 U.S. 344 (1959). The constitutional claims of Petitioner (Walsh) are entirely with merit and were preserved for appeal. Petitioner notified the Court of Appeal, Fifth District, of the violations of the Fourteenth Amendment: equal protection of the law, due process of the law, a fair and impartial appeal, fundamental fairness, and the American with Disabilities Act of 1990, however, all were overlooked.

STATEMENT OF THE CASE

The facts of this case is straightforward. Petitioner ("Walsh"), a licensed real estate "sales-person" [Florida Licensing Law, page 328], began his employment with Vocational Corporation (Vocational) in July 1995 as an independent contractor with more than 20 years experience in the Florida timeshare industry, and without (1) complaint against his license.

Vocational is the developer of a timeshare resort, known as Club Sevilla ("Sevilla"), located in Kissimmee, Florida. Counsel for Petitioner ("counsel") the Administrative Law Judge ("ALJ"), and the Agency ("Division"), have the misconception that Sevilla is located in Orlando, Florida, however, this false belief began with Petitioner's Proposed Order ("PRO") and adopted into the Recommended Order and Final Order.

Counsel also mislead the ALJ into believing that Walsh, not being a real estate broker, [Licensing Laws, pg. 327], could act as a broker for Vocational by having the responsibility of the sales pitch, the conduct of the other independent contractors employed by Vocational, and their training, that is totally against the Florida Real Estate Law. This was the responsibility of Vocational and its Broker.

Soon after Walsh began his employment, Vocational implemented a reduction in the sales staff by terminating all but one of the unlicensed salespeople, leaving four or five salespeople to sell the timeshare interests at Sevilla. The ALJ added that Walsh employed the four or five salespeople. There is no competent substantial evidence to support this.

As a result of the restructuring, Walsh was promoted to Sales Manager, and soon after, to Sales Director. Walsh's responsibilities never changed in regards to the other salespeople, as Walsh was still a licensed salesperson. What did change was (1) his pay structure was increased (2) he only went on sales presentations at the request of the owners. None of the seven claimants in this cause were given a sales presentation by Walsh. For some unknown reason, counsel and the ALJ wanted the Division to know that Walsh earned in excess of $450,000.00 in 1996. There is no competent substantial evidence in the record to support this statement.

Vocational had planned a great future around Walsh, however, Walsh resigned on February 27, 1997, due to several things. One being, Vocational would not take care of their complaints properly, especially, when it came to refunding purchaser's money.

The best example of this, is the seven claimants in

this cause. On January 29, 1996, Raymond Sindel, the first to complain to Vocational, wanting their money refunded, that Michael Osborn, Vice President of Vocational had agreed to, however, 29 months after the complaint, Mr. Sindel finally received his refund on June 24, 1998.

Walsh was issued a Notice to Show Cause concerning these seven claimants as was Vocational. Instead of signing a Consent Order, Walsh requested a Formal Hearing which was granted and set for March 14, 2000. The Order stated the issue against Walsh was whether he committed the alleged acts and, if so, what disciplinary action, if any, was to be taken against his license. The Order stated the Court Reporter would be at the Orlando site.

Prior to the hearing, counsel deposed nine witnesses over a two week period, at the Orlando site. During the depositions, counsel witnessed Walsh, in his electric wheelchair, and due to his disability, the difficulty he had getting close enough to the table and his material. Also, the frustration Walsh was having.

The hearing was to be held in Conference Room 2, a room exactly like the room where the depositions were taken, however, this all changed without notice to Walsh. The hearing was conducted in a very small computer room with a 3x6′ table in its

center. The room and table were so small, the court reporter had to be at the Tallahassee site and Walsh could not get his electric wheelchair close enough to his material. Counsel's staff retrieved a very heavy table leaf and once it was placed over Walsh's lap, he could not move. His material had to be placed on the floor out of his reach. Why was this done, when both conference rooms were empty the entire time of the hearing, was for one reason: counsel took advantage of Walsh and his disability and by doing so, violated the American with Disabilities Act of 1990.

At the conclusion of the hearing, the ALJ permitted both parties to submit the PRO's in his office by March 27, 2000. The Recommended and Final Order's have omitted the due date for the PRO's, however, a letter from the General Counsel's office expresses the due date.

Knowing he couldn't finish his PRO on time, Walsh filed for a continuance. In checking to see if the motion had been ruled on, Walsh was told it that it wasn't. Immediately, Walsh sent his unfinished PRO. Walsh called the ALJ's office at 9:35 on Monday, March 27, 2000, and was assured by the ALJ's assistant that his PRO had arrived safely and was in their office. Later that afternoon he called the Clerk to find that it was filed at 12:50 p.m. as timely.

On March 28, 2000, one day late, untimely, and without a motion for continuance, *Hamilton v. State,* 587 S.2d, counsel filed Petitioner's PRO. It was enclosed in a letter explaining to the ALJ that his assistant told counsel that he had granted Walsh's request for the five-day extention, even though no specific, individual order was filed stating this, although sixteen days later, on April 13, 2000, the ALJ filed his Recommended Order and abused his discretion by ruling Walsh's motion had been granted and Petitioner's PRO was timely filed. The Division violates Walsh's Constitutional Rights intentionally. This must be reviewed and stopped as the Court of Appeal overlooked all of this.

When reviewing the evidence, the Court should have recognized the error of overlooking *Hamilton,* at 1380. Counsel, in quoting *Hamilton*, referred only to 1378, 1389-90, and excluded 1380, which is the only case law in *Hamilton* that has anything to do with this error by the Court.

Petitioner's PRO was taken from the hearing, that the transcript is not in the record. The Recommended Order was based partially on Petitioner's PRO, and the Division adopted both in rejecting all of Walsh's Exceptions to the Recommended Order, that Walsh took from the evidence in the record, that can't be said for the Recommended Order.

In the Recommended Order, the ALJ abused his discretion with findings of fact that are contrary to the evidence and record of the proceedings, as the other part of the Recommended Order was taken from the direct testimony only, of the seven claimants. The Final Order has no competent substantial evidence to support it.

The Court should have realized this in reviewing the Division's statement:

> "Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at an administrative hearing beyond determining whether the evidence is competent and substantial. See *Brogan v. Carter,* 671 So. 2d 822,823 (Fla. 1st DCA 1996)." [R IV 640].

Counsel makes the statement:

> "Even if the agency had had a transcript, it could not reweigh the evidence or credibility of the witnesses who testified at the hearing..." [Brief at 15].

After Walsh filed his exceptions to the Recommended Order, that were rejected, "because Walsh did not file a transcript of the hearing," that

had nothing to do with the Recommended Order or evidence in the record, see *Brogan v. Carter.*

The Final Order was filed and instead of what disciplinary action that was to be taken against Walsh's license as stated in the Order, Walsh was fined $28,000.00.

Walsh filed a motion for rehearing, however, this was rejected also, as the Division didn't feel obligated to rehear a final order.

Walsh filed his Notice of Appeal before the Court of Appeal of Florida, Fifth District, on July 12, 2001. Walsh was in and out of the hospital six times because of complications with infections in his chest cavity and right leg. Walsh could not file for a continuance as the Court ordered Walsh, Order dated November 28, 2000, not to file any more motions in this cause.

Walsh filed the Initial Brief, with the issue to be resolved: the ALJ abused his discretion with findings of fact that are contrary to the evidence and record of the proceedings.

October 26, 2001, Appellee filed its Answer Brief and seventy-nine times the brief was based on inaccurate findings, contradictory statements, prejudice, and false beliefs [pgs. 1-22]. After both parties briefs were filed, the Court sanctioned Walsh

for pointing this out, however, the Court made mention of the words "in the record" when the Court did not have the record to review for two and one half months after the sanction.

On February 14, 2001, Walsh had to have open-heart surgery, however, couldn't file a motion for relief [Order dated November 28, 2000], so two letters were written (1) to the Clerk of Court (2) to the Court itself. Both were overlooked.

Walsh's appeal was **AFFIRMED, PER CURIAM** on April 10, 2001 [App. 1] and the motion for Rehearing was denied on May 10, 2001 [App. 2]. This Petition for Writ of Certiorari timely followed.

REASON FOR GRANTING PETITION

I. THE COURT OF APPEAL COMMITTED ERROR BY OVERLOOKING THE ISSUE TO BE RESOLVED ON APPEAL: THE ALJ ABUSED HIS DISCRETION WITH FINDINGS OF FACT IN THE RECOMMENDED ORDER THAT ARE CONTRARY TO THE EVIDENCE AND RECORD OF THE PROCEEDINGS, IN VIOLATION OF *F.S.A.* SECTION 120.68(10), AND MISAPPREHENDING THE "SUBSTANTIAL EVIDENCE RULE" AS CITED IN *EPPS V. HARRIS*, 624 F.2D 1267 (1980), AND 42 *U.S.C.A.* SECTION 405(G).

Appellant made the statement in his Initial and Reply Briefs:

> "The argument will prove the ALJ abused his discretion in findings of fact that are contrary to the evidence and record of the proceedings" [I Brief at 4].

> "This is the issue on appeal: whether the ALJ abused his discretion with statements and findings of fact that are contrary to the evidence and record of the proceedings." [R Brief at 5].

Nineteen times in the Initial Brief Walsh mentions the issue on appeal is whether the ALJ abused his discretion with findings of fact that are contrary to the evidence and record of the proceed-

ings, however, counsel reverses the issue to mislead the Court by saying:

> "The question to be resolved in this appeal is whether there is competent substantial evidence to support the final order...because Walsh failed to file a transcript of the hearing, he cannot now present a different version of those facts found by the ALJ, which are binding on the agency and which were adopted in full by the agency in the final order, or argue that the agency erred in accepting the ALJ's statement of facts." [Brief at 8, 9].

Appellee also stated:

> "Walsh did not feel it necessary to have the hearing transcribed because the depositions of seven claimants were taken." [Brief at 1, 2].

> "Walsh stated that he did not request the transcript because "he did not feel it necessary to have the hearing transcribed because the depositions of the seven claimants were taken" and made part of the record." [Brief at 14].

> "Walsh states he "wasn't relying on the hearing transcript in his exceptions." Brief at B. He is also not relying on the testimony at the hearing in this new attack on the exceptions in this appeal. Brief at 10, 11." [Brief at 11].

The Division's belief from the Final Order:

> "Because Walsh did not file a copy of the transcript of the hearing, the Division is unable to review the entire record. Therefore, the Division may not reject or modify the findings of fact in the Recommended Order." [R IV 639]

The Final Order, and Appellee's Answer Brief have the misconception that the Recommended Order is based on the hearing, which it was not, and without a transcript of the hearing, Walsh's Exceptions to the Recommended Order and the appeal must be denied. If this were fact, then why did the ALJ base his Recommended Order, in part, on the deposition testimony of the seven claimants [R IV 682 - R VII 1358], whose depositions are in the record, and in part, on Petitioner's PRO, that is based on the hearing where there is no transcript in the record. In order to make this false belief work, the issue on appeal has to be, "if there is competent substantial evidence to support the final order."

The depositions were ordered into evidence on March 9, 2000, just two days before the hearing. They have been in the ALJ's office since November 17, 1999. Walsh did not get a copy of the order until after the hearing was completed. The Order states:

> "Petitioner's Motion to Admit Witnesses Deposition Testimony and Respondent's Add-missions into Evidence is Granted." [R II 352].

The Division's misconception that the Recommended Order is based on the hearing is found in the Final Order:

> "Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at an administrative hearing beyond whether the evidence is competent and substantial." [R IV 640].

Counsel's misconception is stated in Appellee's Answer Brief:

> "Even if the agency had had a transcript, it could not reweigh the evidence or the credibility of the witness who testified at the hearing..." [pg. 15 at 2].

The Court of Appeal overlooked Walsh's entire appeal and misapprehended *F.S.A.* section 120.68(10), as cited in *Florida Dep't of Corrections v. Bradley,* 510 S.2d 1122 (Fla. 1st DCA 1987)[1] and in doing so, violated Walsh's Constitutional Rights to a fair and impartial appeal, fundamental fairness, due process of law, and equal protection of the law.

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[1] Role of appellate court is to determine whether lower tribunal made any ruling or conducted proceedings in manner contrary to established principles of law to prejudice of appellant rather than to relitigate issues.

The Court allowed irrelevant evidence to support its ruling on the appeal, violating *Federal Evidence Rule* 402[2], *F.S.A.* section 120.57(1)(b) 8. 10.

The ALJ abused his discretion and the Court knew this, however, did nothing in reviewing the record to eliminate it. The agency's ruling should have been wiped clean by the Court of Appeal as cited in *Biscayne Federal Savings and Loan v. Federal Home Loan Bank Board,* 572 F.Supp. 998 (1980) and *U.S.C.A.* section 706(2)(a, b).[3]

II. THE COURT OF APPEAL COMMITTED ERROR BY MISAPPREHENDING THE COURT'S OPINION IN *HAMILTON COUNTY BOARD OF COMMISSIONERS V. STATE, BOARD OF ENVIRONMENTAL REGULATION,* THAT THE PROPOSED RECOMMENDED ORDER, FILED UNTIMELY AND THEN RULED TIMELY, SEVENTEEN DAYS AFTER THE PRO'S WERE DUE, IN VIOLATION OF *F.S.A.* 403.011 *et seq.*

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[2] All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by that of Congress, by these rules, or by the other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

[3] Abuse of discretion standard is standard utilized for review on record of agency action, but in de nova review the agency determination is "wiped clean" and the Court makes its own independent judgement. 5 *U.S.C.A.* section 706(2)(A, B).

In Appellee's "Statement of the Case and Facts" in the Answer Brief, counsel makes the statement:

> "The Division does wish to correct Walsh's misstatements: (1) the Recommended Order was entered on April 13, 2000, not April 25, 2000; (2) the ALJ did rule on Walsh's motion for continuance in the recommended order by stating that the parties' proposed recommended orders were timely filed even though no specific, individual order was entered stating this." [Brief at 3], [R Brief at 3].

Walsh, knowing he couldn't finish his PRO on time, motioned for a continuance of at least five days. After calling and hearing his motion hadn't been ruled on, Walsh immediately sent his unfinished PRO to the office of the ALJ. Monday morning, March 27, 2000, Walsh was assured by the ALJ's assistant, that his PRO was in their office.

In early afternoon, Walsh contacted the Clerk's office to find the PRO was filed at 12:50 p.m.

On March 28, 2000, Petitioner's PRO was filed, one day late and untimely. The PRO was

enclosed with a letter dated March 28, 2000, addressed to the ALJ, from the office of the General Counsel, that is in the record. The letter states as follows:

> Dear Judge Manry:
>
> Please find enclosed the department's Proposed Recommended Order. When my assistant checked with your office yesterday, the day it was due to be filed, your assistant indicated that you had granted Mr. Walsh's request for an extention of time in which to file the proposed recommended orders in this case. We were told that an additional five days were added to the filing date.
>
> When I checked the case docket this morning, I noted that Mr. Walsh had filed his proposed recommended order yesterday. The docket does not indicate your order this morning. Therefore, I am filing the department's proposed recommended order today since Mr. Walsh evidently does not need an extention of time in which to file. This was signed by Janis Sue Richardson. [R III 449].

The Court of Appeal did not review the evidence, such as this letter, or the abuse of discretion by the ALJ in ruling Petitioner's PRO was timely filed.

The ALJ's Recommended Order was filed on April 13, 2000, seventeen days after the PRO's were due in his office. In the Recommended Order the ALJ allegedly granted Walsh's continuance and ruled

Petitioner's PRO was timely filed, even though no specific, individual order was filed for this. The Court overlooked section 120.68(7)(c), Florida Statutes (Supp. 1996).[4]

The Court of Appeal overlooked case law in *Hamilton County Board of County Commissioners v. State, Dep't of Environmental Regulation,* 587 S.2d 1380 (Fla. 1st DCA 1991), and *F.S.A.* section 403.011 *et seq.*[5]

Counsel states in the Answer Brief:

"Walsh complains that the ALJ incorrectly ruled that the Division's proposed recom-mended order was timely filed. Brief at 5-6. There is no error in this ruling and no prejudice to Walsh by filing in light of Walsh's motion for a five-day continuance. *Hamilton at 1378, 1389-90.* Counsel and the Division have misinterpreted this case law and overlooked *Hamilton* at 1380.

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[4] From a procedural standpoint, the inquiry is whether "the fairness of the proceedings or the correctness of the [agency] action may have been impaired by material error in procedure.

[5] Like courts in civil proceedings faced with untimely filed answers or responses Division of Administrative Hearing has discretion to extend time of filing of responsive pleading, notwithstanding that rule governing particular pleading uses mandatory language as to time requirements for pleading.

III. THE COURT OF APPEAL COMMITTED ERROR BY OVERLOOKING COUNSEL FOR PETITIONER'S VIOLATION OF THE AMERICAN WITH DISABILITIES ACT OF 1990, BY SWITCHING THE ORDERED HEARING ROOM TO A VERY SMALL COMPUTER ROOM, WITH A 3X6' TABLE, ONLY ADDING TO WALSH'S DISABILITY. ADDITIONALLY, THE COURT OVERLOOKING WALSH'S OPEN-HEART SURGERY IN WHICH HE COULD NOT FILE A MOTION FOR RELIEF, DUE TO THE COURT'S RULING.

Prior to the hearing, counsel deposed nine witnesses in a conference room at the Orlando site. Counsel witnessed Walsh and his disability, and being confined to an electric wheelchair, and the difficulty he was having getting close enough to the table and his material. Counsel witnessed the frustration of Walsh.

Walsh had called the telephone number in the hearing order for the American with Disabilities, however, the number listed was for the hearing impaired only. Walsh contacted the Division concerning the handicap and wheelchair.

In Appellee's Answer Brief, counsel makes the statement:

"Walsh complains about the conference room, but does not allege any prejudice." [pg.21].

Where was counsel during the depositions? The hearing was order to be held in Conference Room 2 at the Orlando site. [R II 315, 340]. Walsh arrived early and went directly to Conference Room 2 which was empty. After several minutes a staff member of the Division came and led Walsh from the room, past the room where the depositions were taken, into a very small computer room with a 3x6′ table in its center, to accomodate counsel and her material, the court reporter, the witness, Walsh and his material, of which, Walsh could not get his wheelchair anywhere near the table. After complaining, counsel's staff retrieved a very heavy table leaf, that once it was placed over Walsh's lap, he could not move. His material had to be placed on the floor, out of his reach.

As expected, counsel witnessed Walsh's frustration and the fact he couldn't function properly in defending himself against these frivilous charges.

Knowing both conference rooms were available, counsel succeeded in accomplishing what was planned by the ALJ and counsel. As a matter of fact, the court reporter had to be at the Tallahassee site as the computer room was inadequate for her.

The entire hearing violated Walsh's Civil Rights that are to be protected and discrimination prohibited as in *American with Disabilities Act of 1990 3(2)(A); E.E.O.C. v. Sara Lee,* 237 F.3d 349; 42 *U.S.C.A.* section 12102(2)(A).

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari to the Court of Appeal of Florida, Fifth District.

Respectfully submitted,

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APPENDIX A

STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES,
Petitioner,

(No filing date by Clerk)

v.

Case No. 99-3006

WILLIAM S. WALSH,
Respondent,
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this proceeding on March 14, 2000, in Orlando, Florida, before Danilel Manry, Administrative Law Judge ("ALJ"), Division of Administrative Hearings ("DOAH"). The parties and their witnesses attended the hearing in Orlando. The undersigned and the court reporter participated by videoconference from Tallahassee, Florida.

APPEARANCES

For Petitioner: Janis Sue Richardson, Esq.

APPEARANCES - Continued

Division of Florida Land Sale, etc.
Northwood Centre (sic)
1940 North Monroe Street
Tallahassee, Florida 32399-1007

For Respondent: William S. Walsh, pro se
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Oviedo, Florida 32765

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated section 721.11(4)(a)(h)(j)(k), Florida Statutes (1995), through misrepresentations in the sale of timeshare estates as further stated in the Notice to Show Cause and, if so, what, if any, penalty should be imposed. (All statutory references are to Florida Statutes (1995) unless otherwise stated).

PRELIMINARY STATEMENT

Petitionerved Respondent with a Notice to Show Cause on June 26, 1999. On June 29, 1999, Respondent filed a Response to Charges in which Respondent requested an administrative hearing. On July 12, 1999, Petitioner referred the matter to DOAH for assignment to conduct the hearing.

At the hearing, Petitioner presented the testimony of five witnesses for admission in evidence

and submitted 13 exhibits for admission in evidence. Respondent testified in his own behalf, called one witness, and admitted eight exhibits for admission in evidence.

The identity of the witnesses and exhibits, and the rulings regarding each are set forth in the record of the administrative hearing. Neither party requested a transcript of the hearing. Petitioner timely filed its proposed recommended order (PRO) on March 28, 2000. Respondent timely filed his PRO on March 27, 2000.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating sellers of timeshare estates ("timeshares") within the meaning of section 721.05(27)(28). Respondent is a seller of timeshares and a licensed real estate salesperson (sic) in Florida with approximately 20 years experience in timeshares.

2. Petitioner charged in the Notice to Show Cause that Respondent violated section 721.11(4)(a)(h)(j)(k). The Notice to Show Cause charges that Respondent violated the respective statutes by misrepresenting: a fact or creating a false or misleading impression regarding a timeshare plan or promotion; the nature or extent of an incidental benefit, within the meaning of section 721,05(17); the conditions of exchange; and the availability of a

resale or rental program.

3. Vocational Corporation ("Vocational") developed a timeshare resort in Orlando, Florida, known as Club Sevilla ("Sevilla"). Vocational hired Respondent in July 1995 as Vocational's sales manager responsible for the sale of all timeshares at Sevilla. Vocational agreed to hire Respondent as an independent contractor and to pay Respondent up to 40 percent commission on cash sales and four to six percent commission on other sales. In 1996, Respondent earned between $380,000 and $457,000 selloing timeshares for Club Sevilla.

4. Respondent employed four or five salespersons to assist him in the sale of Sevilla timeshares. Some of those salespersons testified at the hearing.

5. During the time Respondent sold Sevilla timeshares, Respondent was the president and director of MPW Marketing, Inc. ("MPW"). Respondent's wife was the secretary and treasurer of MPW.

6. MPW employed at least one salesperson (sic) to sell timeshares at Sevilla. MPW was disolved in 1997 for failure to file its annual report.

7. As sales manager for Vocational and as independent contractor, Respondent was solely

responsible for the design and content of the sales program used to sell timeshares at Sevilla and for the conduct of the salespersons employed by Respondent and MPW. When Vocational learned the particulars of Respondent's sales program through complaints from purchasers, Vocational made reasonable efforts to remedy the harm to purchasers and to eliminate the offending practices.

8. Respondent's sales program was directed at occupants of Sevilla. Occupants included owners of Sevilla timeshares, renters, and owners of other timeshare units who were occupying a timeshare at Sevilla through an exchange program.

9. When a new group of occupants arrived at Sevilla, the sales program began with a reception in the form of a pool party, a breakfast, or a dinner. Respondent assigned a salesperson to certain guests and sometimes assigned himself to a few guests. At each reception, each salesperson and Respondent would meet their assigned guests and make appointments for a timeshare sales presentation and tour.

10. At the salespresentation, each salesperson sat at a table with prospective purchasers and performed the sales presentation designed and required by Respondent. Upon completion of the sales presentation, Respondent would come to the table to close

the sale. Respondent would go over the sales presentation and emphasize certain points.

11. On October 24, 1995, Clarence and Maxine Shelt attended a sales presentation with their friends Raymond and Charlene Sindel from their respective home city of Delta, Ohio. The Shelts and Sindels owned other timeshares not located at Sevilla.

12. Maxine Shelt purchased a timeshare at Sevilla because Respondent promised her and her husband that they could use the exchange program for a timeshare anywhere in the world for $79, 52 weeks a year. The Shelts tried to use the exchange program through Tri Realty, Inc. ("Tri Realty") because that was the agency Respondent told the Shelts to use. Tri Realty denied any knowledge of such a program, and Tri Realty never offered such a program.

13. Respondent represented that the Shelts could sell their two timeshares relatively easily at a price stated in a price list Respondent provided to the Shelts. Based on Respondent's representation, the Shelts listed their two timeshares for resale with Tri Realty. The two timeshares never sold.

14. The Shelts attempted to discuss the sale of their units with the Respondent several times. Respondent became unavailable to the Shelts after the second conversation. Mrs. Shelt went to Orlando and complained to a representative of vocational

concerning her dissatisfaction with Respondent. Vocational refunded the Shelt's purchase money for the Sevilla timeshare.

15. Respondent also represented to the Sindels that the exchange program at Sevilla would allow them to exchange their Sevilla timeshare for a timeshare anywhere in the world for $79, 52 weeks a year. After purchasing a timeshare at Sevilla, the Sindels attempted to use the exchange program described by Respondent, but found that no such program existed.

16. Respondent also represented to the Sindels that their existing timeshares could be sold "before the end of the year" and that the sales proceeds would pay for the timeshare at Sevilla. Respondent provided the Sindels with a computer printout purporting to be the market value for the existing timeshares. Respondent represented that the timeshares would sell very quickly, especially those located on the resort coast. The Sindels listed their timeshares with Tri Realty, but the timeshares never sold.

17. The Sindels complained to Vocational about Respondent. Vocational refunded the purchase price of the Sevilla timeshare to the Sindels.

18. On June 26, 1996, Mildred and Eugene Plotkin attended a salespresentation from their home

in Greenville, North Carolina. Respondent represented that the Plotkins would be able to obtain a credit card that they could use to pay for the Sevilla timeshare at a very low interest rate. Respondent further represented that he could sell the Ploykins existing timeshare in Las Vegas in two months so that they could use the sales proceeds to pay off the credit card.

19. The Plotkins used their two wxisting credit cards to pay for Sevilla timeshare. The credit card promised by Respondent never came. The Las Vegas timeshare did not sell in the time promised.

20. The Plotkins did not get their low-interest credit card, found the Las Vegas timeshare had not sold, and began receiving interest charges on their existing cards for the purchase of the Sevilla timeshare. Respondent paid the credit card charges incurred by the Plotkins with checks issued on the MPW account.

21. On July 26, 1996, Susan Bailey attended a sales presentation from her home in Wiggins, Mississippi. Respondent represented that Ms. Bailey would receive a credit card with a credit line of $20,000 and an interest rate of 8.9%. Respondent gave Ms. Bailey what he represented to her as a confirmation of her right to the credit card.

22. Ms. Bailey purchased a Sevilla timeshare in

reliance upon Respondent's representations but never received a credit card. She attempted to speak to Respondent but discovered that Respondent had resigned his position at Sevilla. She spoke to someone else at Sevilla and applied for a different credit card with a lower line of credit and a higher interest rate.

23. On December 11, 1996, Larry and Carla Eshleman attended a salespresentation from their home in Dowington, Pennsylvania. Respondent represented that Mr. Eshleman would receive a credit card with a credit line of $25,000 and an interest rate of 8.9%. Respondent represented that the Eshlemans could use the credit card to pay for the Sevilla timeshare and that Respondent would sell the two timeshares already owned by the Eshlemans before the first payment was due on the new credit card. Respondent provided a computer printout purporting to be the market value of their existing timeshares.

24. Respondent told the Eshlemans that he would pay for the families to stay in the Eshlemans' existing timeshares and make sales presentations to these families. Respondent represented that it was in his best interest to sell the timeshares quickly because it would cost Respondent $149 to send each family to each timeshare for eight days and seven nights. Respondent assured the Eshlemans that it would be no

problem to sell the existing timeshares because Respondent had done it many times.

25. Respondent also told the Eshlemans that Respondent could rent the Sevilla timeshare for $875 for the lockout unit, $1050 for the one bedroom unit, or $1650 for both units in any year the Eslemans did not use the Sevilla timeshare. Respondent represented that the Eshlemans could make money off the timeshare when they did not use it.

26. In reliance upon Respondent's presentations, Mr. Eshleman purchased a Sevilla timeshare. Respondent never sold the Eshlemans timeshare. When the Eshlemans complained to Vocational, Vocational refunded their purchase money.

27. On September 19, 1996, Thomas and Betty Prussak attended a sales presentation from their home in Medina, Ohio. Respondent asked Mr. Prussak if Mr. Prussak wanted to buy a Sevilla timeshare. Mr. Prussak stated that he already owned two weeks of timeshares and wanted to sell those two. Respondent offered to sell the existing timeshares if Mr. Prussak purchased a timeshare from Respondent. Respondent represented that the sales proceeds from one of the existing timeshares would pay off the Sevilla timeshare and Mr. Prussak would have cash in hand from the sale of the second timeshare less 10% commission to Respondent for

both timeshares.

28. There is no #28.

29. Respondent represented to Mr. Prussak that Respondent would sell the existing timeshares for market value. Respondent made a telephone call or fax communication to an unknown source and then told Mr. Prussak that the two ezisting timeshares were worth $12,000 each. Respondent represented to Mr. Prussak that Respondent would probably have one of the two existing timeshares sold by the end of the week because it was a "Five Star" unit. Respondent represented that his sales representatives would "get right on it" and that all they had to do was to take people there and they'll go."

30. In June 1996, Mrs. Cynthia Richards and her now deceased husband attended a sales presentation at Sevilla. Mrs. Richards now lives in Randolph, New Jersey. Respondent represented that if the Richards purchased a Sevilla timeshare, Respondent would sell their existing timeshare for $2000 over the purchase price of the Sevilla timeshare. Respondent represented that he had buyers in mind from England. The extra cash appealed to the Richards to pay off existing bills.

31. The Richards purchased a Sevilla timeshare in reliance upon Respondent's representations. The existing timeshares never sold. Mrs. Richards

attempted to telephone Respondent several times, but was never able to speak to Respondent.

32. Vocational received approximately 50 other complaints from purchasers of Club Sevilla timeshares describing representations by Respondent similar to those described in previous findings. Petitioner provided Respondent with notice that Petitioner intended to use six of these 50 complaints as similar fact evidence pursuant to section 120.57(1)(d). Findings based on similar fact evidence are set forth in paragraphs 33-40.

33. In May 1996, Mr. and Mrs. Tim Malone attended a sales presentation from their home in Sturgeon, Minnesota. Respondent represented that he would be able to sell the Malone's existing timeshare "by the end of the year" for its market value of $9800. Respondent represented that he would pay for families to stay in the Malone's existing timeshare and attempt to sell the unit for them. Respondent assured the Malones that he would sell the existing unit before the end of the year because it cost Respondent to send potential buyers to the existing unit.

34. In reliance upon Respondent's representations, the Malones purchased a Sevilla timeshare. Respondent never sold the Malone's existing timeshare. The market value was less than $5000.

35. In July 1996, Mr. and Mrs. Lambert attended a sales presentation from their home in Sharon Hill, Pennsylvania. Respondent represented that he would be able to sell the Lambert's existing timeshare and that the Lamberts would receive a credit card they could use to pay for the Sevilla timeshare.

36. The Lamberts purchased a Sevilla timeshare in reliance upon Respondent's representations. The Lamberts never received a credit card. Respondent never sold their existing timeshare. Vocational refunded the purchase money for the Sevilla timeshare to the Lamberts.

37. In August 1996, Mr. Andrew Eger attended a sales presentation from his home in Orlando, Florida. Respondent represented that the exchange program at Sevilla would allow Mr. Eger to exchange his timeshare for another anywhere in the world for $149, 52 weeks a year. Mr. Eger discovered that the exchange program started at $149 for units available only in the following 59 days and that the least expensive exchange actually available any other time started at $350.

38. Mr. Eger cancelled the purchase of his timeshare within the 10-day recission period provided in written contract. Respondent threatened Mr. Egers with lawsuits and with refusing to refund the $8,000 due.

39. In February 1997, Mr. David and Margaret Maybloom attended a sales presentation from their home in Staten Island, New York. Respondent represented that he would sell their existing timeshare for $3000 and thereby subsidize the cost of the Sevilla timeshare. Respondent's salesperson also represented that the Mayblooms would receive a credit card with a credit limit of $20,000, that they could use to purchase the Sevilla timeshare.

40. The Mayblooms purchased a Sevilla timeshare in reliance upon Respondent's representations. They received a credit card with a credit limit of $6000, but Respondent did not sell the existing timeshare.

41. Vocational did not offer a resale, exchange, or rental program with a purchase of a Sevilla timeshare. Vocational did not have a contract for resale, exchange, or rental with Tri Realty.

42. Vocational did not offer a credit card as an incidental benefit of purchasing a Sevilla timeshare. Vocational did not file the availability of a credit card as an incidental benefit pursuant to section 721.075(1)(g).

43. At the beginning of Respondent's tenure as sales manager, Vocational did offer a credit card as an incidental benefit for a short period. Vocational

terminated the credit card program shortly after Respondent became sales manager. However, Respondent continued to offer the credit card to prospective purchasers as an inducement to purchase a Sevilla timeshare.

CONCLUSION OF LAW

44. DOAH has jurisdiction over the subject matter and parties. The parties were duly noticed for the administrative hearing.

45. Petitioner has the burden of proof in this proceedings. Petitioner must show by clear and convincing evidence that Respondent committed the acts alleged by Petitioner and the reasonableness of any proposed penalty. Department of Banking and Finance, Division of Securities and Investors Protection v. Osborn Stern and Company, 670 S.2d 932, 935 (Fla. 1996).

46. Petitioner satisfied its burden of proof. Petitioner showed by clear and convincing evidence that Respondent violated section 721.11(4)(a)(h)(j)(k).

47. Section 721.11(4) provides, in relevant part:

(4) No Advertising or oral statement made by any seller shall:

(a) Misrepresent a fact or create a false or misleading impression regarding the timeshare

plan or or promotion thereof.

(h) Misrepresent the nature and extent of any incidental benefit.

(j) Misrepresent the conditions under which a purchaser may exchange the right to use accomodationa or facilities in another location.

(k) Misrepresent the availability of resale or rental program offered by or on behalf of a developer.

• • •

48. Respondent violated section 721.11(4)(a) through repeated oral misrepresentation that the timeshare plan at Club Sevilla included an exchange program, a resale program, a rental program, and a credit card benefit. Respondent violated 721.11(4)(h) by orally misrepresenting that a low-interest credit cards were available to purchasers as an incidental benefit of the timeshare program and promotion for Sevilla timeshares. Respondent violated section 721.11(4)(j) by orally misrepresenting that purchasers could exchange their Sevilla timeshares for $79 anywhere in the world, 52 days (sic) a week. Respondent violated section 721.11(4)(k) by orally misrepresenting that he could sell their existing timeshares and rent their Sevilla timeshares and by orally misrepresenting the terms

and conditions under which he could do so.

49. In order for evidence to be clear and convincing:

> ...evidence must be found to be credible, facts to which witnesses testify must be distincly remembered, testimony must be precise and expicit, and witnesses must be lacking in confusion...
>
> The evidence must be of such weight that it produces in the mind of the trier of fact a firm...conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slowmowitz v. Walker, 429 So.2d 787, 799 (Fla. 4th DCA 1983).

50. The evidence submitted by Petitioner was clear and convincing for the essential elements in the charges against Respondent. The evidence submitted by Respondent was neither credible nor persuasive.

51. When Respondent testified during the hearing, he spent most of his opportunity to testify as a fact witness by commenting on the testimony of other fact witnesses called by Petitioner and by engaging in legal argument as to why the testimony of those witnesses should not be believed. The ALJ repeatedly instructed Respondent that he was not

using opportunity to testify in a manner that served Respondent's best interest because the ALJ could consider as evidence only Respondent's factual testimony and that Respondent would have the oportunity in his PRO to make legal argument as to why Petitioner's witnesses should not be believed. Nonetheless, Respondent had difficulty understanding the distinction between legal argument and fact testimony and the impropriety of a fact witness commenting on the testimony of other fact witnesses.

52 Respondent is not subject to a lesser standard of conduct, as distinguished from legal competence, than a licensed attorney. A contrary rule would insulate a party from applicable standards on conduct by choosing lay representation. Cf. Jancyn Manufacturing Corporation v. Florida Department of Health, 24 Fla. L. Weekly D2232, 2233 (Fla. 1st DCA 1991); Burke v. Harbor Estate Associates, Inc., 591 So.2d 1034, 1037-1038 (Fla. 1st DCA (1991) (party cannot avoid fees and costs in frivilous action choosing lay representation). Accord Dolphins Plus v. Residents of Key Largo Ocean Shores, 598 So.2d 324 (Fla. 3 DCA (1992).

53. Section 721.26(5)(e) authorizes Petitioner to impose a fine up to $10,000 for each seperate offense committed by Respondent and a cease and desist order barring Respondent from further conduct in violation of applicable statutes. Florida

Adminisstrative Code Rule 61B-41 provides guidance in imposing statutorily authorized penalties.

54. In addition, the reasonableness of any penalty imposed in this case should serve the legislative intent stated in sections 721.02 and 721.03. In section 721.02, the legislature made clear that full and fair disclosure in the sale of timeshares is necessary in order to protect the quality of Florida's timeshare plans and the consumers who purchased them and to safeguard the tourism industry that is vital to the state's economy.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a final order finding Respondent guilty of violating section 721.11(4)(a)(h)(j)(k), entering a cease and desist order prohibiting Respondent from further violations of Chapter 721 in the sale of timeshares, imposing a civil penalty in the amount of $28,000, and requiring Respondent to pay the civil penalty within 45 days of the date of this Recommended Order by certified check made payable to the Treasurer, State of Florida, Department of Business and Professional Regulation which Respondent shall mail by certified mail to Mr. John Floyd, Investigator Supervisor, Department of Business

and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1030.

s/
DANIEL MANRY,
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the Division of Administrative Hearings this 13th day of April, 2000.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

APPENDIX B

Final Order No. BPR-2000002308 Date 6-15-00

Filed
Department of Business and Professional Regulation
AGENCY CLERK
Sarah Wachman, Agency Clerk
By: s/
Brandon M. Nichols

STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF LAND SALES, (No stamped filing date)

Petitioner.

v. DOAH Case No. 99-3006
Docket No. YS1999115

WILLIAM S. WALSH,

Respondent.
_____/

FINAL ORDER

The Director of the Division of Florida Land Sales, enters this Final Order in the above referenced matter.

PRELIMINARY STATEMENT

1. On June 1, 1999, the Division issued a Notice to Show Cause which alleged that the Respondent, William S. Walsh violated sections 721.11(4)(a)(h)(j)(k), Florida Statutes (1995). The Notice advised the Respondent of his right to request a formal or informal proceedings pursuant to chapter 120, Florida Statutes.

2. On June 24, 1999, the Respondent answered the Notice to Show Cause by letter and requested a Formal Proceeding, which was initially scheduled for December 1, 1999. Respondent requested a continuance which was granted by the Administrative Law Judge (ALJ).

3. On March 14, 2000, the Division of Administrative Hearings (DOAH) conducted a hearing in Orlando, Florida by teleconference, with Judge Manry presiding. Division was represented by Janis Sue Richardson, Esquire. Respondent represented himself. The hearing was conducted in accordance with sections 120.569 and 120.57(1), Florida Statutes. Upon conclusion of the hearing, the ALJ allowed each party to submit proposed orders. Respondent filed a request for a continuance on March 22, 2000, by facsimile. The ALJ indicated in his Recommended Order thyat both parties timely filed proposed recommended orders. Recommended Order at 2.

4. Petitioner presented testimony of eight witnesses[1] by deposition admitted by the ALJ before the hearing; presented the testimony of 5 witnesses at the hearing, and submitted 13 exhibits for admission at the hearing. Respondent testified in his own behalf, called one witness, and submitted 8 exhibits for admission at the hearing. The rulings on the evidence are in the record.

5. On April 13, 2000, the ALJ entered a Recommended Order finding that Walsh had violated section 721.11(4)(a)(h)(j)(k), Florida Statutes (1995) by making oral misrepresentations in his sales pitch to timeshare purchasers. Recommended Order at 13-14.

6. Neither party requested a copy of the transcript. Recommended Order at 2.

7. On April 25, 2000, Respondent filed his Exceptions to the Recommended Order, but did not file a copy of the hearing transcript.

8. Petitioner did not file exceptions, but did file a reply to Respondent's exceptions on May 3, 2000.

RULING ON EXCEPTIONS FILED BY RESPONDENT

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[1] Susan Bailey, Larry Eshleman, Cheryl LaFountaine, Mildred Plotkin, Thomas Prussak, Cynthia Richards, Maxine Shelt, and Raymond Sindel.

9. Respondent enumerates 43 exceptions to the Recommended Order.[2] Numbers 1-35[3] are exceptions to the Findings of Fact, numbered 44-54 are exceptions to the Conclusion of Law. Because Walsh did not file a copy of the transcript of the hearing, the Division is unable to review the entire record. Therefore, the Division may not reject or modify any of the findings of fact in the Recommended Order. See *Financial Marketing Group, Inc., v. State, Dep't of Banking and Finance*,352 So.2d 524 (Fla. 3d DCA 1077).

10. Respondent raises one procedural exception, number 1, to the finding of both parties timely filed their Proposed Recommended Orders (PRO). Respondent claims that Petitioner filed its PRO a day late. As the filing in PRO's is within the discretion of the ALJ under Florida Administrative Code Rule 29-106.215 and the ALJ determined that the filing was timely, this exception is rejected. Further, Respondent has not alleged, nor can he show, that he has been prejudiced by the ALJ's determination that Petitioner's filing, one day after his, had prejudiced him in any way.

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[2] Walsh's exceptions are numbered 1 through 35 in the Findings of Fact, however, there was no number 17 or 34. His exceptions to the Conclusions of Law are numbered 44-45, however, number 44 is noted as "accepted." Each numbered exception has one or more subsets.

[3] See note 3.

11. Florida case law holds that an agency reviewing a recommended order is not authorized to reevaluate the quantity and quality of the evidence presented at an administrative hearing beyond determining whether the evidence is competent and substantial. *Brogan v. Carter,* 671 So.2d 822, 823 (Fla. 1st DCA 1996). On reviewing a recommended order, an agency may not reweigh the evidence, resolve conflicts, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the fact-finder. See *Martuccio (sic) v. Dep't of Prof. Reg.,* 622 So.2d 607 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Reg.,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). The Division is bound by the ALJ's factual findings where the record of the hearing discloses any competent substantial evidence supporting the findings of fact. *Florida Dep't of Corrections v. Bradley,* 510 S.2d 1122, 1123 (Fla. 1st DCA 1987).

12. Even if the agency had had the record to review, all of Respondent's exceptions would be rejected because they would require the agency to reweigh the credibility of witnesses, reassess evidence, resolve conflicts in testimony, insert new testimony in the record or revise testimony. See section 120.57(1)(1), Fla. Stat.; *Martuccio (sic) v. Dep't of Prof. Reg.,* 622 So.2d at 609. Further, many

of Respondent's exceptions are gratuitous attacks on the integrity of the ALJ and opposing counsel and must be rejected as improper.

A. EXCEPTIONS TO FINDINGS OF FACT

13. Respondent's exceptions 1a,1c,2,3,4,5,5a,6, 6a,6b,7,7a,8,8a,9,10,11,14,14a,15,19,19a,20,21,21a, 22, 23,27,28a,31,32a,33, and 35 are rejected as they are requests to reweigh the evidence or resolve alleged conflicts in the evidence. See 120.57(1)(1) Fla. Stat., *Martuccio (sic),* 609 So.2d at6 609.

14. Respondent's exceptions 1b,2,3,4,5,5a,6,6a,7, 7a,8a,8b,9a,14,16,18,19,19a,20,21,21a,23,24,25,27, 28,28a,29,30,31,32,32a,33, and 35a are rejected as these exceptions are an attempt to rewrite testimony or to insert new facts alleged by Respondent into the record. See 120.57(1)(1), Fla. Stat.; *Martuccio (sic)* 622 So.2d at 609.

15. Respondent's exceptions to 3,11,19,22,25,26, and 27 are rejected as these are a request to reassess the credibility of witnesses. See 120.57(1)(1), Fla. Stat., *Martuccio (sic)* 622 So.2d at 609.

16. Respondent's exceptions 26 and 32a are legal argument and are rejected. See 120.57(1)(1), Fla. Stat.; *Martuccio (sic),* 622 So.2d 609.

17. Respondent's exceptions 1b,3,5,8a,8b,9-15,18-19a,22,24,25,26,27,28,32a,35,35a, and 45-54

are improper commentary, or gratuitous attacks on counsel for Petitioner or the ALJ. These exceptions are rejected. See 120.57(1)(1), Fla. Stat.; See *Martuccio (sic),* 622 So.2d at 609; see Generally *Bellsouth Human Resourses Admin., Inc., v. Colartarci,* 641 So.2d 427 (Fla. 4th DCA 1994) (proper argument is restricted to the issues in the pleadings, the facts shown by evidence and inferences drawn from these facts, not an attack on counsel).

18. Respondent's exceptions 21,24, and 25 rely upon a credit card application he introduced at depositions of two witnesses, which depositions were admitted into evidence. The ALJ ruled that the credit card applications were not admissible over Petitioner's objections raised during the depositions. Order (March 9, 2000). Therefore, Respondent's exceptions 21,24 and 25 are rejected.

19. Respondent's exceptions 27-31 are to Findings of Fact 33-40, which are letters admitted as similar fact evidence under section 120.57(1)(d), Florida Statutes. There is competent substantial evidence and legal basis for Findings of Fact 33-40; therefore, Respondent's exceptions 27-31 are rejected.

20. Respondent's exceptions 32a to Findings of Fact 41 also argues that the ALJ should not have refused his request to allow a post-hearing

deposition of a witness who did not appear for the purpose of impeaching one of Petitioner's witnesses. The Recommended Order notes that Respondent testified in his own behalf and presented the testimony of one witness. Recommended Order at 2. All rulings on evidence are in the transcript. *Id.* The absent witness was being called to impeach one of Petitioner's witnesses on a fact that does not appear to be material to this case. Even if Respondent's no-show witness had offered impeachment testimony on a single immaterial fact, the Division may not modify the ALJ's judgement on the weight given the evidence or credibility of the witness. The Division rejects this exception as a request to second guess the ALJ on an evidentiary ruling without benefit of a transcript. Further, there is competent substantial evidence to support Findings of fact 41.

21. All of the Administrative Law Judge's findings of fact are supported by competent, substantial evidence, therefore all of Respondent's exceptions are rejected.

B. EXCEPTIONS TO CONCLUSION OF LAW

22. Respondent accepted Conclusion of Law 44, but filed exceptions to Conclusions of Law 45-54. The Division finds that the ALJ's Conclusions of Law are correct and rejects all of Respondent's exceptions.

23. Exception 45 challenges Conclusion of Law 45 in which the ALJ found that Petitioner had the burden of proof, that it had to prove allegations by clear and convincing evidencem and that it had to show the reasonableness of the penalty sought. Respondent does not really argue with the standard of proof, but states that the ALJ has not reviewed the entire record. The Division rejects Respondent's unfounded attack on the ALJ as it is directed at the Conclusion of Law, and the ALJ's conclusion is correct. Therefore, exception 45 is rejected.

24. Exception 46 simply disagrees with Conclusion of Law 46 in which the ALJ found that Petitioner had proven its case by clear and convincing evidence. The ALJ's conclusion of law is correct; therefore exception 46 is rejected.

25. Exception 47 challenges Conclusion of Law 47 in which the ALJ quotes the applicable portions of the statute at issue, section 721.11(4), Florida Statutes. Respondent argues that he has not violated this statute, but does not indicate that the citation is incorrect. The ALJ's conclusion of law is correct; therefore, exception 47 is rejected.

26. Exception 48 challenges Conclusion of Law 48, in which the ALJ found that Respondent violated section 721.11(4)(a)(h)(j)(k), Florida Statutes, through repeated oral misrepresentations made to

induce people to purchase a timeshare, by attacking the ALJ. The ALJ's conclusion of law is correct; therefore, exception 48 is rejected.

27. Exception 49 challenges Conclusion of Law 49, which is a citation authority defining the clear and convincing standard of proof. Respondent challenges this conclusion by claiming that none of the witnesses testimony is "credible" and that the ALJ ignored the evidence he prooffered. This is a challenge to the weight of the evidence, not to the legal conclusion, and is valid. The ALJ's conclusion of law is correct; therefore, exception 40 is rejected.

28. Exception 50 challenges Conclusion of Law 50, which finds the Petitioner's evidence was clear and convincing on each of the charges presented, and finds that Respondent's evidence was neither credible nor persuasive. Respondent again attacks the ALJ with accusations of bias and failure to review the evidence. This is improper argument. The ALJ's conclusion of law is correct; therefore, exceptiuon 50 is rejected.

29. Exception 51 challenges Conclusion of Law 51, which finds that Respondent used his opportunity to testify to the facts as an opportunity to attack the credibility of the witnesses and the weight of the evidence despite repeated instructions as to the purpose of giving testimony. Respondent

states that the ALJ's interpretations were deliberate attempt to confuse him because the ALJ "didn't want to hear the truth." Exceptions at 52. This is improper legal argument. The ALJ's conclusion of the law is correct; therefore, exception 51 is rejected.

30. Exception 52 challenges Conclusion of Law 52, in which the ALJ found that Respondent was not held to a lesser standard of conduct at the hearing. Respondent cites a federal case law on the filing of pro se complaints, which is not on point and does not apply to administrative proceedings under chapter 120, Florida Statutes. The ALJ's conclusion of law is correct; therefore, exception 51 is rejected.

31. Exception 53 challenges Conclusion of Law 53 in which the ALJ found that the Division may impose a penalty for violation of chapter 721, Florida Statutes. Respondent's comments are improper. The ALJ's conclusion of law is correct; therefore, exception 53 is rejected.

32. Exception 54 challenges Conclusion of Law 54 in which the ALJ found that the reasonableness of any penalty should comport with the legislative purpose of ensuring full and fair disclosure in timeshare sales. Respondent again attacks the ALJ, rather than presenting legal argument. The ALJ's conclusion of law is correct; therefore, exception 54 is rejected.

FINDINGS OF FACT

33. The Division hereby adopts and incorporates by reference the Findings of Fact numbered 1 through 43[4] as set forth in the Recommended Order.

CONCLUSION OF LAW

Based on the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Respondent cease and desist from any further violations of chapter 721, Florida Statutes.

2. Respondent pay a penalty of $28,000 by cashier's check or money order made payable to Treasurer, State of Florida, Department of Business and Professional Regulation within 45 days of the date of this Order, which Respondent shall mail by certified mail to Mr. John Floyd, Investigator Supervisor, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-1030.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 15th day of June, 2000.

s/
Ross Fleetwood, Director
Division of Florida Land

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[4] There is no number 28.

Sales, Condominiums, and
Mobile Homes, Department
of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY ANY PARTY SUNSTANTIALLY AFFECTED BY THIS FINAL ORDER PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE PROCEDURE, BY FILING A NOTICE OF APPEAL CONFORMING TO REQUIREMENTS OF rULE 9.110(D), FLORIDA RULES OF APPEALLATE PROCEDURE. BOTH WITH THE APPROPRIATE DISTRICT COURT OF APPEAL, ACCOMPANIED BY THE APPROPRIATE FILING FEE, AND WITH THE AGENCY CLERK, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AT 1940 NORTH MONROE STREET, TALLAHASSEE, FLORIDA 32399-1007 WITHIN 30 DAYS OF THE RENDITION OF THIS ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Certified Mail to William S. Walsh, 2156 Turnberry Drive, Oviedo, Florida 32765 this day of , 2000.

No Signature

Copies furnished to:

Division of Administrative Hearings
Janis Sue Richardson,
Office of the General Counsel
Laura Glenn, Bureau Chief of Timeshare

APPENDIX C

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1940 NORTH MONROE STREET TALLAHASSEE, FLORIDA 32399-1030

DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND MOBILE HOMES, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION,

Petitioner,

v.

WILLIAM S. WALSH,

Respondent,

_____/

FILED
DBPR
AGENCY CLERK
CLERK S/_____
DATE 7-21-2000

DOAH CASE NO. 99-3006
BPR No. TS 991285
TS19991125
Received by General Counsel's office on July 26, 2000

ORDER DENYING RESPONDENT'S MOTION FOR REHEARING

Petitioner, the Division of Florida Land Sales, Condominiums, and Mobile Homes within the Department of Business and Professional Regulation (Division), denies Respondent William S. Walsh's (Walsh) motion for rehearing.

FINDINGS OF FACT

1. A final order adopting a Recommended Order in full was rendered in this case on June 15, 2000. The Final Order addressed Walsh's exceptions,

which were filed without a copy of the hearing.

2. Walsh filed a motion for rehearing on July 6, 2000. Walsh asserts three reasons as to why the Division should rehear this case: (1) the Administrative Law Judge's Recommended Order lacked substantial competent evidence in the seven witnesses deposition transcripts; (2) the Division did not have a hearing transcript, but had seven deposition transcripts admitted into evidence; (3) the Division has exceeded its delegated legislative authority. Walsh requests a rehearing to "prove there is no competent evidence used by the ALJ and the Agency in the preparation of the Final Order."

3. Walsh claims are directed to the substantive issues decided by the Administrative Law Judge. Walsh raised these claims in his exceptions to the Recommended Order without filing a transcript of the hearing. Walsh claims were ruled upon in the Final Order.

CONCLUSION OF LAW

4. There is competent substantial evidence to support the Division's findings of fact.

5. There is no statute or rule authorizing the Division to rehear its Final Orders. See sections 120.569, 120.57, Fla. Stat.; ch. 28-106, Fla. Admin. Code, *et seq.; Systems Mgmt. Assocs., Inc. v. State,*

Dep't of Health and Rehab. Servs., 391 So.2d 688 (Fla. 1st DCA 1980).

6. Walsh does not point to any clerical error justifying the need to amend the finsl order. See *Taylor v. Department of Prof. Reg., Bd. of Medical Examiners*, 521 So.2d 557 (Fla. 1988). Walsh does not assert that there has been a change in circumstances or that there exists a public need to modify the final order. See *Russel v. Department of Prof. Reg.*, 645 So.2d 117 (Fla. 1st DCA 1994).

7. There is no factual or legal basis authorizing the Division to rehear this case or reconsider its Final Order. Walsh claims fall within those addressed on appeal. See section 120.68, Fla. Stat. Further, the time for appeal runs from the entry of the Final Order. See *Systems Mgmt.*, 391 So.2d at 690.

8. There is competent substantial evidence to support the Division's conclusion of law.

ORDER

It is, hereby, ORDERED that Respondent's Motion for Rehearing is DENIED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 20th day of July, 2000.

"Seal"

s/
Ross Fleetwood, Director

Division of Land Sales,
Condominiums, and
Mobile Homes, Department
of Business and Professional
Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-

1030

CERTIFICATE OF SERVICE

I HEREBU CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to William S. Walsh, 2156 Turnberry Drive, Oviedo, Florida 32765, this 24th day of July, 2000.

s/
Kristie Harris, Docket Clerk

Copies furnished to:

Laura Glenn, Bureau Chief
Mary Devise O'Brien, Assistant
General Counsel.

APPENDIX D

(Published)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

WILLIAM S. WALSH,
Appellant,

v. Case No. 5DOO-1938

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS AND MOBILE HOMES.

Appellee.

_____/

Decision filed April 10, 2001

Administrative Appeal from the Department of Business and Professional Regulation.

William S. Walsh, Oviedo, pro se

Janis Sue Richardson of Department of Business and Professional Regulation, etc. for Appellee.

PER CURIAM

AFFIRMED.

COBBS, PLUES, AND PALMER JJ., CONCUR.

APPENDIX E

(PUBLISHED)

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA, FIFTH DISTRICT

WILLIAM S. WALSH,
Appellant,

v.

Case No. 5DOO-1938

DEPARTMENT OF BUSINESS
AND PROFESSIONAL, ETC.,
Appellee,

_____/

Date: May 10, 2001

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, filed April 20, 2001, is denied.

I hereby certify that the foregoing is (a true copy of) the original Court Order.

/s/ FRANK J. HABERSHAW, CLERK